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526-731--73----1

In the Supreme Court of the United States

OCTOBER TERM, 1973

No.

UNITED STATES OF AMERICA, PETITIONER

v.

PASCUAL GUANA-SANCHEZ

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App A, *infra*, pp. 1a–13a) is not yet reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, p. 14a) was entered on July 18, 1973. A timely petition for rehearing was denied on September 25, 1973 (App. C, *infra*, p. 15a). On October 17, 1973, Mr. Justice Rehnquist extended the time for filing a petition for a writ of certiorari to November 23,

1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a defendant has standing to obtain suppression of the testimony of witnesses who, after having been unlawfully arrested while passengers in his automobile, gave statements revealing the commission of a crime by the defendant and confirming their identity as potential witnesses against him.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

8. U.S.C. 1324(a) provides in pertinent part:

> Any person, including the owner, operator, pilot, master, commanding officer, agent, or consignee of any means of transportation who—
>
> * * * * *
>
> (2) knowing that he is in the United States in violation of law, and knowing or having reasonable grounds to believe that his last entry into the United States occurred less than three years prior thereto, transports, or moves, or attempts to transport or move, within the United States by means of transportation or

> otherwise, in furtherance of such violation of law;
>
> * * * * *
>
> any alien, including an alien crewman, not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States * * * shall be guilty of a felony * * *.

STATEMENT

Respondent Pascual Guana-Sanchez was charged in a one-count indictment returned in the United States District Court for the Northern District of Illinois with having knowingly and unlawfully transported three aliens into the United States, in violation of 8 U.S.C. 1324(a)(2). Respondent filed a pre-trial motion to suppress evidence and to dismiss the indictment, alleging that he and the passengers in his car had been illegally arrested and that the government's evidence depended upon the testimony of the passengers. After an evidentiary hearing, the district court granted the motion to suppress the future testimony of the three passengers (App. D, *infra*, pp. 16a–26a). The court of appeals affirmed, one judge dissenting (App. A, *infra*, pp. 1a–13a).

1. The relevant facts, as developed at the hearing on the motion to suppress and as set forth in the opinion of the court below, are as follows (*id.* at 1a–3a):

On November 17, 1971, at approximately 2:30 a.m., two local police officers in Villa Park, Illinois, approached respondent's station wagon, which was parked in a vacant lot. The headlights and interior light were shining, and respondent was in the driver's

seat, reading an Illinois road map. The officers noticed that the car also contained three male passengers, one of them asleep, and three shopping bags filled with "clothing or material." Upon inquiry of the driver and of police headquarters (by radio), the officers established that respondent possessed a valid driver's license, that the automobile was registered in his name, and that he was not "wanted by the police." The officers also learned, upon thereafter inquiring of the passengers, that they could not speak English and had no American identification; one had identification connecting him with the Mexican National Guard.

Their suspicions aroused, the police officers called their supervisor and, on his instruction, they ordered two of the passengers into their car and took them to the police station; respondent and the third passenger followed, at the officers' direction. The supervising sergeant at the station then telephoned an immigration official in Chicago, who spoke with respondent's passengers, then told the police that the passengers had admitted illegal entry into the United States. He directed the officers to detain respondent and the three passengers. On the following morning, the passengers were turned over to immigration officers. Respondent was subsequently indicted for having transported them illegally.

2. In June 1972, the district court granted respondent's pre-trial motion to suppress the testimony of the three aliens who had been present in respondent's automobile. The court found that, while the police

officers' initial interrogation may have been based on "proper investigative suspicions" (App. D, *infra*, p. 19a), those suspicions became unjustified after the officers ascertained that respondent had a valid driver's license and was the owner of the station wagon. Accordingly, the court concluded, the further interrogation of the car's passengers and respondent's arrest were unlawful (*id.* at 19a, 23a), and the discovery of the passengers' status as participants in and witnesses to respondent's offense was the improper product of illegal police conduct (*id.* at 19a, 24a).

The district court asserted, moreover, that the future testimony of a witness is "verbal evidence" subject to exclusion on the same basis as unlawfully obtained physical evidence under the "fruit of the poisonous tree" doctrine (*id.* at 23a–24a). Believing that the government had not shown that the testimony of the witnesses could have been obtained independently of the illegal conduct, the court therefore unqualifiedly granted respondent's motion to suppress both the witnesses' testimony and any information obtained as a result of their interrogation (*id.* at 24a, 26a).

3. The government did not challenge in the court of appeals—and does not challenge here—the district court's conclusion that, when the police took respondent and his passengers to the police station, they made an unlawful arrest. The majority of the court of appeals agreed with that determination, although the court also concluded that the interrogation of

respondent and the passengers while they were in the car was proper (App. A, *infra*, pp. 3a–4a and n. 3).[1] The majority affirmed the district court's unqualified suppression of the passengers' testimony on the ground that evidence gained as a result of the arrests "was 'fruit of the poisonous tree'" (*id.* at 5a).

Judge Pell dissented, concluding, *inter alia*, that respondent had no standing to suppress the witnesses' testimony (an issue which the majority had not discussed), because he was not aggrieved by their deten-

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[1] The district court treated the questioning of the passengers while they were in the car as being equivalent to a search of the car, even though the passengers were in plain view (App. D, *infra*, p. 26a), and held that that interrogation was improper (*id.* at 19a). For the purposes of the appeal only, the government assumed *arguendo* that the questioning of the passengers while in the car was a search as to which respondent had standing to object and that, if that search were illegal, the testimony of the witnesses could be suppressed as to a person having standing to object to the search. The government contended, however, that any such search was lawful. The court of appeals apparently agreed, for it treated the case as involving only a question of an unlawful arrest, not an unlawful search, and the court explicitly stated that "[w]hen the arrest was made" the interrogation of the passengers while inside the car had already occurred (App. A, *infra*, p. 4a, n. 3).

We do not believe that, properly analyzed, this case presents in fact any question concerning a search. The officers did not enter the car, the passengers were in plain view, and respondent had no property right or other legally protected interest in their continued presence in his car. The government's concession below for the sake of argument concerning the "search" issue, noted by the court of appeals (*id.* at 5a, n. 4), that respondent would have standing to seek suppression of the fruits of an unlawful search of his car, has no bearing on the question whether he is entitled to obtain suppression of the fruits of the unlawful arrest of the passengers.

tion and had no legal basis for asserting their right to be free from illegal seizure (*id.* at 12a–13a).[2]

REASONS FOR GRANTING THE WRIT

In holding that respondent had standing to secure the unqualified suppression of the future testimony of his passengers, the court of appeals has rendered a decision on an important question of constitutional law in conflict with the decisions of this Court and of other courts of appeals.

We note initially that, despite the fact that the majority opinion below focused its discussion on the legality of respondent's arrest, the testimony of the passengers could only be regarded as the "fruit" of the unlawful arrest of the passengers, and was not a fruit of respondent's arrest. Respondent himself made no incriminating statements, and his arrest yielded no information pointing to the commission of this offense or his passengers' status as witnesses thereto. Had repondent alone been arrested, there would plainly have been no "tainted fruit" stemming from his arrest. Conversely, if only the passengers, but not respondent, had been arrested, every piece of informa-

[2] Judge Pell also discussed at some length (*id.* at 6a–11a) the question whether, assuming that the knowledge that respondent had committed an offense and that the passengers were witnesses to the offense was the product of unlawful police action, it followed that the testimony of the witnesses as to events that transpired before the encounter with the police should properly be suppressed. He concluded that the proffer of living witnesses was a materially different proposition from the use of inanimate objects as evidence, and that the majority's decision constituted a departure from the general rule that the former is not automatically to be suppressed. (See n. 4, *infra*.)

tion would have been learned (as it was), yet there would obviously have been no relationship between their statements or testimony and any unlawful arrest of respondent. The fact that both respondent and the passengers happened to be arrested at the same time and under similar circumstances does not in any way make the statements or testimony of the passengers the "fruit" of respondent's arrest.

Inherent in the court of appeals' affirmance of the suppression order, therefore, is a determination that respondent may be permitted to obtain exclusion of evidence derived from the arrest of his passengers. Evaluation of the correctness of this decision turns upon the answers to two questions: Did the illegal police conduct leading to knowledge of respondent's commission of the offense and the passengers' status as witnesses thereto (concededly the product of the illegal arrest and detention of the passengers and demonstrably not the product of any illegal arrest of respondent) violate any rights of respondent? Is there some reason why the general standing requirement in Fourth Amendment cases should not be applied or should be altered in the circumstances of this case?

As a general proposition, it is well recognized that the rights protected by the exclusionary rule are personal ones, enforceable only by the individual against whom the unlawful conduct was directed or whose rights were infringed thereby. Accordingly, one whose sole grievance is that evidence obtained by violation of another's rights is sought to be used against him is denied standing to assert vicariously the claim of illegality. See, *e.g.*, *Alderman* v. *United States*, 394 U.S.

165, 171–176; *Simmons* v. *United States*, 390 U.S. 377, 389; *Jones* v. *United States*, 362 U.S. 257, 261. This rule limiting standing to invoke the exclusionary rule to persons whose rights were infringed by the unlawful police actions in question has been applied in a variety of contexts, including cases where evidence was assertedly the tainted fruit of an illegal wiretap (*Alderman* v. *United States*, *supra*), of other types of unlawful searches (*Brown* v. *United States*, 411 U.S. 223, 227–230; *Wong Sun* v. *United States*, 371 U.S. 471, 491–492), and of other allegedly unlawful activity. (*E.g.*, *Zaroogian* v. *United States*, 367 F. 2d 959, 962 (C.A. 1).

In the instant case, the court of appeals simply adverted to the illegality of the arrests, without any analysis of the relationship between that illegality and the obtaining of prosecutorially useful information. The tainted information, however, did not flow from the arrests themselves, but from statements made by one of the passengers to an immigration official during the ensuing illegal detention. In permitting the respondent to challenge the government's enjoyment of the fruit of the immigration officer's interrogation (the knowledge that respondent had committed a crime and that the passengers were witnesses to it), the decision below conflicts with decisions of other courts of appeals denying a defendant standing to complain that information used against him was obtained from another person in a manner that violated the Fifth Amendment rights of that person (*e.g.*, *United States* v. *Bryson*, 419 F.2d 695, 698–699, 700, n. 24 (C.A.D.C.) (violation of *Miranda* rules); *United*

States v. *Goodwin*, 470 F.2d 893, 903 (C.A. 5) (testimony compelled in bankruptcy hearing)) or was obtained during a period of unlawful detention of that person. *E.g.*, *United States* v. *Howell*, 470 F.2d 1064, 1066–1067 (C.A. 9) (detention in violation of Fed. R. Crim. P. 5(a)).

The foregoing cases differ from the instant case in that they did not involve unlawful arrests. To the extent that the illegality of the arrests is considered material—and we do not believe it creates an analytically significant distinction—the decision below conflicts with decisions of other courts of appeals holding that a defendant does not have standing to seek the exclusion of evidence derived from a search incident to the unlawful arrest of another. *E.g.*, *United States* v. *Humphrey*, 409 F. 2d 1055, 1058 (C.A. 10); cf. *United States* v. *Brown*, 425 F. 2d 1172, 1174 (C.A. 9); *United States* v. *Hamilton*, 457 F. 2d 95, 100, n. 12 (C.A. 3). For example, in *Humphrey* the court held that the defendant had no standing to challenge the legality of the arrest and incidental search of the driver of the car in which the defendant was a passenger (the converse of the situation here but the same in legal principle).

The question remains whether there are present in this case any factors that would take it outside the operation of the principles of standing discussed above. This, we submit, would require a showing that the arrest of the passengers and their subsequent detention and questioning infringed in some material respect upon respondent's rights. The majority below

did not address this question; the dissent did and, in our view, convincingly disposed of the notion that the aliens' status as passengers in respondent's car at the time of their arrest was a circumstance creating standing (App. A, *infra*, pp. 12a–13a):

> The fact that the passengers had been in the defendant's automobile should not, it appears to me, create some sort of vicarious standing. The defendant's transportation of the illegal immigrants should not be the basis of creating an immunity for him from harmful testimony. * * * He had no proprietary interest in their bodies—or minds.

Because the passengers were human beings and not property, and because the arrest of the passengers entailed no entry by the police into respondent's automobile, he should not be given standing to complain about their arrest or anything that ensued therefrom.

The court of appeals' unexplained departure from established principles of standing thus conflicts with decisions of other courts of appeals, reflects an unsound and undesirable principle of law, and injects serious confusion into the law of standing to invoke the exclusionary rule.[4]

[4] Even if respondent were properly considered to have standing to challenge the use against him of testimony of the passengers or information provided by them, it does not follow that the exclusionary rule was properly applied in this case to bar their live testimony at trial with respect to events transpiring prior to the occurrence of any police illegality. Whether such testimony is properly excludable as a nonattenuated "fruit" of the initial illegality presents an important and difficult question, as to which we are in general agreement with the observations made in Judge Pell's dissent. We do not raise this issue

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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Solicitor General.
HENRY E. PETERSEN,
Assistant Attorney General.
GERALD P. NORTON,
Assistant to the Solicitor General.
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NOVEMBER 1973.

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as a primary question presented because we believe that this case does not provide a suitable vehicle for analysis of the issue. Analysis of the propriety of such a novel application of the exclusionary rule would, it seems to us, require consideration of the relationship between the purposes of the rule, the nature of the interests invaded by the unlawful police conduct, the way in which the illegality taints the evidence, and the nature of the use to be made of the arguably tainted evidence. These considerations cannot readily be weighed in the abstract, and respondent's lack of standing here inevitably interferes with sound analysis—it being essential to include in the analytic equation a consideration of the nature of the wrong done the defendant and the manner in which it produced the testimony sought to be suppressed. Absent standing, there is no causal relationship to consider.

APPENDIX A

In the United States Court of Appeals
for the Seventh Circuit
September Term, 1972—January Session, 1973

No. 72-1784

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

PASCUAL GUANA-SANCHEZ, DEFENDANT-APPELLEE

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division

No. 72-CR-50

JAMES B. PARSONS, *Judge*
Argued January 23, 1973—Decided July 18, 1973

Before KILEY, FAIRCHILD and PELL, *Circuit Judges*.

KILEY, *Circuit Judge*. Defendant, Sanchez, was charged in a one count indictment with knowingly and unlawfully transporting aliens within the United States in violation of 8 U.S.C. § 1324(a)(2). After an evidentiary hearing the district court granted Sanchez's motion to suppress evidence unlawfully seized by police. The government has appealed. We affirm.

On November 17, 1971, at approximately 2:30 a.m., Villa Park, Illinois, police officers Tenuto and Hall observed Sanchez sitting in a station wagon, about 150 to 200 feet away, in a vacant lot, with headlights and interior light shining. When the officers approached

the car, Sanchez was in the driver's seat and was reading an Illinois road map. At this time the officers observed three other males also in the car, one of them sleeping and three shopping bags filled with "clothing or material" in the rear of the car.

The officers then began an inquiry which disclosed that Sanchez had a valid driver's license, that his passengers were probably Mexican, and led to the further disclosure that the car was registered in Sanchez's name and that he was not "wanted by the police." The police then radioed for their supervising sergeant. Upon the sergeant's arrival and, at his direction, two of Sanchez's passengers were directed to enter a police car and were driven to a police station. Sanchez was "invited" to follow with the third passenger.

At the police station the sergeant spoke on the telephone with Captain Partin, a Chicago immigration official, who then spoke to Sanchez's passengers. Partin directed the police to detain Sanchez and his passengers, whom Partin told the police had admitted illegal entry into the United States. The four men were locked up overnight, were picked up by immigration authorities the next morning, and Sanchez was subsequently indicted. The proceeding before us followed.

Three steps in time can be delineated from the facts before us: (1) the original interrogation ending with the determination of validity of Sanchez's driver's license and his ownership of the car; (2) the period beginning with the return to Sanchez of his license and of the restraint upon his movement thereafter; and, (3) the period beginning with the trip to the police station.

The district judge conducted an evidentiary hearing at which the parties stipulated that no arrest or search warrant had issued. Officer Tenuto was the only government witness.[1] After the hearing, the district judge read his findings of fact and conclusions of law[2] in which he decided that the police officers had a reasonable suspicion justifying their interrogation, in the first step of the police activity, but that there was no probable cause to justify their activity thereafter.

When the sergeant appeared at Sanchez's car and appraised the situation, he said to officers Tenuto and Hall, "[l]et's bring them into the station and check them out and see who they are, if they are wanted by anybody." Two of the passengers were then ordered out of Sanchez's car and into a police car for the trip to the police station. Under the circumstances we take officer Tenuto's testimony that Sanchez was "invited" to follow to mean that he was ordered. Officer Tenuto testified that "[w]e did not have anything to bring them into the station for." The district judge properly noted that "Sanchez was taken into custody by the * * * officers for investigation * * * [and] [t]here is no crime of 'investigation.'" See *Davis* v. *Mississippi*, 394 U.S. 721, 726–27 (1969); *United States* v. *Foust*, 461 F. 2d 328, 330 (7th Cir. 1972). The police had no greater knowledge when they arrested Sanchez than they had after the end of the initial intrusion on reasonable suspicion. On the contrary, they had additional knowledge that he was most probably

[1] The government stated that officer Hall's testimony would be substantially similar to Tenuto's.

[2] The written memorandum from which he read is not in the record.

innocent of any connection with crime.[3] At best they had "hunches" of criminality but that is not sufficient. *Terry* v. *Ohio,* 392 U.S. 1, 21–22 (1967).

There was no showing by the evidence "* * * that the exigencies of the situation" made the warrantless arrest "imperative." *Coolidge* v. *New Hampshire,* 403 U.S. 443, 454–55 (1971). The police had the burden of justifying the arrest. *United States* v. *Burhannon,* 388 F. 2d 961, 962 (7th Cir. 1968). And the standards for warrantless arrests "are at least as stringent" as those applicable to a magistrate's assessment. *Whiteley* v. *Warden,* 401 U.S.. 560, 566 (1971). This record falls far short of the required showing.

The warrantless arrest must be judged as of the time it was made. It could not be aided by the post facto developments of immigration official Partin's statement to the police that Sanchez's passengers were probably illegal entrants into the United States, nor by reason of the warrantless search of Sanchez's car which produced a hand gun in the glove compartment. See *Henry* v. *United States,* 361 U.S. 93, 103 (1959).

The government's reliance upon this court's decision in *United States* v. *Chaidez-Castro,* 430 F. 2d 766 (7th Cir. 1970), and *United States* v. *Madril,* 445 F. 2d 827 (9th Cir. 1971), is misplaced. In *Chaidez-Castro* there

[3] When the arrest was made the police knew Sanchez owned the car and had a valid driver's license and they had no reason to believe that he was committing or was probably connected with an offense. The police had learned by observation before the arrest that Sanchez spoke, and his passengers responded in, a language the police "did not understand" but which was probably Spanish and that the passengers were probably Mexican or Puerto Rican. But the court properly noted that there is no crime in speaking Spanish or being Mexican or Puerto Rican. See *United States* v. *Mallides,* 473 F. 2d 859, 860 (9th Cir. 1973).

were, in support of the warrantless arrest, Texas license plates on the truck and extra Texas license plates on the floor of the cab, and "the most persuasive [fact] was the police officers' observation of a number of faces peering from the inside of a 'home-made' box on the back of the truck." In *Madril* the court sustained the warrantless arrest, where the initial stop was occasioned by a speeding violation and thereafter the driver was unable to produce proof of ownership as required by law. Moreover, there was an outstanding warrant for defendant which was discovered during the course of checking the status of the vehicle and its occupants.

We have considered, but need not pass upon, other points raised.

We conclude that the district court did not err in deciding that the arrest was unreasonable under the Fourth Amendment and that the evidence gained thereafter was "fruit of the poisonous tree." *Wong Sun* v. *United States*, 371 U.S. 471, 488 (1963).[4]

AFFIRMED.

PELL, *Circuit Judge* (dissenting).

Being of the opinion that the passengers, witnesses to a crime, should not have been suppressed as witnesses, *i.e.*, in effect being made incompetent to testify to matters within their knowledge concerning criminal activity on the part of someone else, I respectfully dissent.

It is not entirely clear to me as to when the district court thought the illegal police activity commenced.

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[4] The government concedes that the testimony of witnesses discovered during an illegal search can be suppressed as to a person having standing to object. We think the same is true in the event of an illegal arrest. See *United States* v. *Mallides*, *supra*, at p. 861.

The majority opinion of this court construes the district court opinion as holding that the police officers had a reasonable suspicion justifying the initial interrogation. I agree, and to the extent that the district court indicated otherwise it would seem clearly wrong. Four men were parked in a vacant lot in an industrial area at 2:30 in the morning in a Chicago suburb where recent burglaries had taken place. The defendant's story of looking for a friend's restaurant did not check out as all restaurants in the area had been closed for several hours. The officer who testified had had past experience with illegal immigrants who had been transported into this country by automobile. The area had small factories "looking for cheap labor." The passengers in the automobile spoke no English nor did they have any United States identification cards. One of the occupants had a card which appeared to be a Mexican Army card. Three shoppings bags of clothing were in the car.

On the basis of these facts, I would have some difficulty in faulting the police conduct. See *United States* v. *Catalano*, 450 F. 2d 985 (7th Cir. 1971). The police action was scarcely of the dragnet variety. However, this aspect of the case does not assume the significance that two other facets do.

The first of these is the extent to which the exclusionary rule should be extended. Putting the matter another way, how remote a branch of a poisoned tree is still capable of bearing tainted fruit not subject to the plucking for testimonial use? I am here, of course, assuming arguendo that the police conduct was such as to bring into play the exclusionary rule as to any tangible item found in the automobile or any statement that might have been made by any of the persons in the automobile. Here, however, the effect of the district court ruling is to make witnesses to a crime in-

competent to testify. "The rules which disqualify witnesses who have knowledge of relevant facts and mental capacity to convey that knowledge are serious obstacles to the ascertainment of truth. For a century the course of legal evolution has been in the direction of sweeping away these obstructions." McCormick On Evidence § 71, at 150 (1954).

A reversal of direction in this well developed trend of the law can obviously be dictated by policy considerations. I fail to find, however, such a countervailing policy here. I am not unmindful that respectable authority [1] has held that the exclusionary rule should be carried to the present position and that the Government has conceded that if a defendant has standing, testimony of witnesses discovered during an illegal search can be excluded. Nevertheless, the rationale of the exclusionary rule in my opinion does not call for its extension to the point of excluding altogether an otherwise competent witness. In so stating, I do not suggest that the weight of his testimony could not be challenged by showing the impact of the method of discovery on the likelihood of the witness's telling the truth, e.g., if he were under compulsion to testify because of awareness that his own involvement in a crime was known by virtue of a Fourth Amendment violation.

We do not here have a *Wong Sun* [2] situation in which the excluded evidence, a verbal statement, is deemed to be equated with "physical, tangible materials obtained either during or as a direct result of an unlawful invasion." We here have witnesses who were in plain view of officers who, at the time, were

[1] See, for example, *Smith* v. *United States*, 344 F. 2d 545 (D.C. Cir. 1965); *United States* v. *Tane*, 329 F. 2d 848 (2d Cir. 1964).

[2] *Wong Sun* v. *United States*, 371 U.S. 471, 484–6 (1963).

engaged in their "community caretaking functions." *Cady* v. *Dombrowski*, — U.S. —, 41 U.S.L.W. 4995, 4996–99 (June 21, 1973). Essentially, it appears to me, we are dealing with a question of the extent to which the exclusionary rule might reasonably be expected to have a deterrent effect on proscribed police conduct. We know that the rule is not absolute, one to be applied in all circumstances. Thus, the Supreme Court in *Harris* v. *New York*, 401 U.S. 222 (1971), held that a statement wich was inadmissible against a defendant in the prosecution's case in chief because of a *Miranda* violation might be used for impeachment purposes. While we here have a proposed use of witnesses in the affirmative case of the prosecution, I cannot conceive that the rationale of deterrence of police misconduct will be furthered by this extension of the rule. The "speculative possibility that impermissible police conduct will be encouraged" (401 U.S. at 225) by making witnesses competent in the present situation appears so remote to me that a sound public policy would draw the exclusionary situation short of a mandatory incompetency.

Indeed, in those cases holding that the witness himself may be the product of the poisoned tree and therefore not free to testify as to his knowledge of the crime, the exclusion is not absolute and recognition has been given to what might be called an "attenuation test." *Smith* v. *United States, supra*, 344 F. 2d at 547. I have some conceptual difficulty in determining how an exclusionary rule designed to control police behavior can be applied on a case-by-case basis as *Smith* would have us do. I am certain that police officers would have an even greater difficulty in determining whether a possible witness's testimony was attenuated from illegality.

While *Smith* did not purport to overrule an earlier case of the same circuit, *Smith* and *Bowden* v. *United States*, 324 F. 2d 879 (D.C. Cir. 1963), *cert. denied*, 377 U.S. 954 (1964), nevertheless, the earlier case in which the court spoke through then Judge Burger is worthy of extensive quotation as illustrating the concepts which I believe should be applicable in the present situation.

> Courts have gone a long way in suppressing evidence but no case as yet has held that a jury should be denied the testimony of an eyewitness to a crime because of the circumstances in which his existence and identity was learned. However, in our view, the relationship between the inadmissible confessions and Holman's testimony in the District Court months later is so attenuated that there is no rational basis for excluding it. No case has been cited to us in which the testimony of an eyewitness or factual witness has been excluded because his identity was discovered as a result of disclosures made by an accused during detention violative of Rule 5(a) Fed R. Crim. P. * * *
>
> The District Judge correctly read this court's holding in *Killough* v. *United States*, 114 U.S. App. D.C. 305, 315 F. 2d 241 (1962), as not requiring the exclusion of Holman's testimony. Neither the Killough holding, the Mallory holding nor any other case would warrant excluding Holman's testimony. The fact that the source of evidence is "tainted" by violation of constitutional or statutory provisions has not precluded the use of that evidence in every circumstance. * * *
>
> Here no confessions or utterances of the appellants were used against them; tangible evidence obtained from appellants, such as the victim's watch, was suppressed along with the confessions. But a witness is not an inanimate ob-

> object which is itself contraband, narcotics, a pistol or stolen goods, "speak for themselves." The proffer of a living witness is not to be mechanically equated with the proffer of inanimate evidentiary objects illegally seized. The fact that the name of a potential witness is disclosed to police is of no evidentiary significance, per se, since the living witness is an individual human personality whose attributes of will, perception, memory and volition interact to determine what testimony he will give. The uniqueness of this human process distinguishes the evidentiary character of a witness from the relative immutability of inanimate evidence. 324 F. 2d at 881–2. [Footnotes omitted.]

It appears to me that in the intervening ten years the exclusionary rule has been expanded so as mechanically to equate the proffer of a living witness with the proffer of inanimate evidentiary objects illegally seized.

What appears to me to be a recession from the underlying principles announced in *Smith* and *Bowden* followed within less than a year in *McLindon* v. *United States*, 329 F. 2d 238, 241 n. 2 (D.C. Cir. 1964), in which the court stated it did not read *Smith* and *Bowden* as holding that testimony may never be excluded. However, in so stating, reliance was placed on cases which forbade testimony as to visual and aural observations during an unlawful search. This, it appears to me, is no support for the present matter; obviously, if seized heroin is to be excluded, a witness who was present at the seizure should not be permitted to testify to the nature and identity of the seized material. The equation is clear and all that has to be justified is that the material itself is subject to suppression.

I note that the *McLindon* court did not mechanically equate the proffer of a witness whose knowledge was independent of the improper conduct with the proffer of illegally seized, inanimate evidentiary objects. Instead, in remanding for a hearing, it laid down a case-by-case standard as follows:

> In each case the court must determine how great a part the particular manifestation of "individual human personality" played in the ultimate receipt of the testimony in question. Indications in the record that mere knowledge of the witness' identity would not inevitably guarantee that his testimony would be favorable to the prosecution; that the witness might eventually have voluntarily gone to the police even without their knowing his identity; that his testimony has remained unchanged from the start—all are relevant factors to be considered in determining the final outcome. 329 F. 2d at 241 n. 2.

I find no consideration by the district court in the present case of any such factors. Rather, the rule was mechanically applied to exclude everything connected with the claimed improper conduct in a broad sweep of the broom which somehow is supposed to restrain undesirable constabulary conduct.

The rule as so expanded makes appropriate another quotation from *Smith* and *Bowden, supra* at 882:

> Mr. Justice Jackson would appear to have had something like this in mind when he expressed unwillingness to debase constitutional doctrine "by making of them mere technical loopholes for the escape of the guilty. The petitioners have had fair trial and fair review. The people of the State are also entitled to due process of law." *Stein* v. *People of State of New York*, 346

U.S. 156, 196, 73 S. Ct. 1077, 1098, 97 L. Ed. 1522 (1953).

Of equal if not greater importance is the second significant facet of this case, that of standing. Of course, any indicted defendant is aggrieved by testimony which reflects on his guilt. Standing is something more than this human reaction. In *Tone*, the Second Circuit, which did apply the exclusionary rule to a witness, first considered the question of standing and determined that there was standing. In *Smith*, however, there seems to have been no consideration of the question. Whatever doubt there may have been as to the necessity of stand would seem to have been put to rest by the Supreme Court in *Alderman* v. *United States*, 394 U.S. 165, 171–2 (1969), where the Court stated:

> The established principle is that suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence.

The passengers in defendant's automobile, all in plain view, were discovered initially during the course of what seems clearly to have been a valid investigatory stop. I cannot find any standing on the part of the defendant arising from the transportation of the passengers to the police station. They may have been aggrieved in a standing sense but it is not they who are attempting to assert a right of suppression. The fact that the passengers had been in the defendant's automobile should not, it appears to me, create some sort of vicarious standing. The defendant's transportation of the illegal immigrants should not be the basis of creating an immunity for him from harmful testi-

mony. Cf. *United States* v. *Chaidez-Castro,* 430 F. 2d 766 (7th Cir. 1970). He had no proprietary interest in their bodies—or minds. I would vacate the order of suppression, reverse, and remand for a trial.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

United States Court of Appeals for
the Seventh Circuit

Chicago, Illinois 60604

July 18, 1973

Before Hon. ROGER J. KILEY, Circuit Judge; Hon. THOMAS E. FAIRCHILD, Circuit Judge; Hon. WILBUR F. PELL, Jr., Circuit Judge

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT, *v.* PASCUAL GUANA-SANCHEZ, DEFENDANT-APPELLEE

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

APPENDIX C

In the United States Court of Appeals
For the Seventh Circuit

No. 72-1784

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

vs.

PASCUAL GUANA-SANCHEZ, DEFENDANT-APPELLEE

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division (72 CR 50)

Before Hon. ROGER J. KILEY, *Circuit Judge;* Hon. THOMAS E. FAIRCHILD, *Circuit Judge;* and Hon. WILBUR F. PELL, JR., *Circuit Judge.*

(September 25, 1973)

On consideration of the petition for rehearing and suggestion that it be heard en banc filed in the above-entitled cause, no judge in active service having requested a vote thereon, nor any judge voted to grant the suggestion, and all of the members of the panel having voted to deny a rehearing,

IT IS ORDERED that the petition for a rehearing in the above-entitled cause be and the same is hereby denied.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

No. 72 CR 50

UNITED STATES OF AMERICA, PLAINTIFF

v.

PASCUAL GUANA-SANCHEZ, DEFENDANT

Transcript of Proceedings

had in the above-entitled cause before the Hon. JAMES B. PARSONS, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on June 8, 1972, at 11:00 o'clock, a.m.

Present: Mr. MICHAEL D. STEVENSON, Assistant United States Attorney, On behalf of the Government: Mr. JOSEPH BEELER, On behalf of the Defendant.

* * * * *

The COURT: This is 72 CR 50, *U.S.* vs. *Pascual Guana-Sanchez*. This is the memorandum opinion and order.

This matter is before me today for a ruling on the motion to suppress and dismiss filed by the defendant, Pascual Guana-Sanchez. On November 17, 1971 at 2:30 a.m. Mr. Sanchez and three passengers in his automobile were taken into custody by two Villa Park police officers who had observed Mr. Sanchez' station wagon parked on a vacant lot located on the northeast corner of the intersection of North and Addison Roads in Villa Park.

The officers, upon observation of Mr. Sanchez' automobile, radioed a message to the police station that they were going to the "aid of a motorist in distress," gave the dispatcher the Illinois license number of the station wagon, and drove to the other side of the intersection.

The officers then questioned Mr. Sanchez as to whether he was having trouble and Mr. Sanchez replied that he was looking for a restaurant on North Avenue owned by a friend, and he displayed a match book advertising this restaurant. It was in an adjacent town.

One of the officers checked in with the police dispatcher and learned that the restaurant was not open.

The officer returned with the above information and then one of the officers requested that Mr. Sanchez produce his driver's license. This license appeared to be an entirely valid Illinois driver's license.

Furthermore, his name and address on the driver's license corresponded to the information the officer had previously received as a result of his radio check of the license plate of the car.

This radio report had been requested by the officers at 2:33 a.m. and was received by them at 2:35 a.m. It verified not only the name and addresses of the owner but also that the car was not stolen or wanted in connection with any crime.

The officer having completed his inspection of the driver's license, returned the license to Mr. Sanchez. Thus, at this point there were no grounds stated to infer that a crime was being committed, had been committed or was about to be committed. Nevertheless, one of the state officers proceeded to request identification from the three passengers in the car.

Two of the passengers were not able to produce any identification, and the third passenger produced a card

written in a foreign language, and handed it to one of the officers, who saw the word "Mexico" and other words which he made out to indicate an affiliation with the Mexican National Guard.

Consequently, the officers radioed their sergeant, who was in another Villa Park police car, and he drove to the scene. Mr. Sanchez was asked to follow a patrol car to the police station. With this he complied.

After they entered the station Mr. Sanchez' car later then was searched without his consent being obtained.

We need not here go into the search or the fruits, as the government agrees that such discussion would merely serve to create an unnecessary issue for the Court to consider.

Sometime thereafter one of the local officers telephoned the Immigration and Naturalization Service in Chicago. The Immigration officer on the phone spoke with the three passengers and then informed Sargeant Weiser of the Villa Park police that the passengers were aliens illegally within the United States. He requested that they and Mr. Sanchez be held until officers of the Immigration & Naturalization Service could come to Villa Park the next morning, later.

Mr. Sanchez was then placed in a detention cell. The passengers were placed in a different detention cell.

I find that Mr. Sanchez and the three passengers of his automobile were seized by the Villa Park, Illinois police officers without a warrant for arrest or without a warrant for search, thus it became the burden of the prosecution to demonstrate probable cause for the police intrusion.

I quoted *United States* vs. *Buchannon,* 388 Fed 2d 961 at 962, a Seventh Circuit Decision in 1968.

The defendant contends, and this Court agrees, that the government did not justify the police conduct and that, "Under our system suspicion is not enough for an officer to lay hands on a citizen of the United States. It is better so, the Fourth Amendment teaches, that the guilty sometimes go free than the citizens be subject to easy arrest." *Henry* vs. *U.S.,* 361 U.S. 98 at 104, a 1959 decision.

Mr. Sanchez was taken into custody by the Villa Park police officers "for investigation." There is no crime called "investigation."

I, however, do not believe that the police had a legitimate reason for detaining Mr. Sanchez, his automobile or his passengers. The officers had viewed the car and had seen no evidence of a crime.

They had ascertained from police headquarters that the car was not stolen nor wanted and that it was owned locally. They determined that the driver of the car had a valid operator's license and was the owner of the vehicle.

Whatever proper investigative suspicions they may have had earlier were dispelled at this point, and thus it was unjustified to hold the vehicle longer, or its occupants, or to interrogate the passengers.

I find that Mr. Sanchez' arrest was made for "investigation" at a time when the officers should have been satisfied that Mr. Sanchez had committed no crime needing "investigation."

Illinois law provides that a police officer may arrest a person when "he has reasonable grounds to believe that the person is committing an offense against the laws of the State of Illinois or has committed an

offense." Illinois Revised Statutes, Chapter 38, Section 107–2(c).

In addition, Illinois law provides for a temporary questioning; we commonly refer to it as a search—what do you call it? Stop and search.

But without authorizing arrest this is possible under Illinois Statute, Chapter 38, Section 107–14. That provision states, and let me quote from it:

> A peace officer, after having identified himself as a peace officer, may stop any person in a public place for a reasonable period of time when the officer reasonably infers from the circumstances that the person is committing or is about to commit a crime, or has committed an offense as defined in Section 102–15 of the Code, and may demand the name and address of the person and an explanation of his actions. Such detention and temporary questioning will be conducted in the vicinity of the person where he is stopped.

The only formal arrest authorized by the provision is one for unlawful possession of a weapon discovered as a result of a reasonable preventative frisk conducted for the safety of the questioning officer. This is Illinois Revised Statutes, Chapter 38, Section 108–1.01.

There was no preventative search here under the circumstances at the location of the car. In sum, Illinois does not authorize arrest for "investigation," and, moreover, I find that Illinois law forbids even questioning of persons under such instant circumstances as found in this case after both Mr. Sanchez' license plates and his operator's license had been cleared.

Illinois police officers are not vested by Illinois law with a roving commission to detain any or all persons in order to demand satisfactory proof of identity

from them, and to haul them and their companions to a police station upon failure to produce the requested identification, and even if they were so vested by Illinois law, such a grant would be a violation of the Fourth Amendment of the Constitution of the United States.

In order to read the Illinois Statute as constitutional, I must read this requirement in it. Therefore the—wherefore, the government urges me to consider *U.S.* vs. *Chaidey-Castro,* 430 Fed 2d 766, a Seventh Circuit case of 1970 as authority for the police conduct in this case, and maintains that *United States* vs. *Chaidey-Castro* clearly controls the issue in the present case.

I find that the case is distinguishable from *U.S.* vs. *Chaidey-Castro* on a number of points.

That case held that there was probable cause for search due to a combination of the following factors: The police found a truck blocking a Chicago street; the truck had an unusual appearance and bore an apparently home-made box, and therein the police observed human faces peering out the windows of the box. The truck bore Texas license plates. There were extra license plates in the cab of the truck, and there had been police radio reports of illegal Mexican immigrants in which—of which the police were before the approached the vehicle aware. [Sic]

In the instant case there were no such grounds for any suspicion on the part of the Villa Park police officers; indeed, the officers had no such suspicions and originally had gone to Mr. Sanchez' station wagon to "aid a motorist in distress."

Another issue that must be disposed of in the instant case is whether Illinois law provides that local police officers may arrest for offenses which are exclusively federal offenses and are not state or local offenses.

I find that the arrest authority bestowed on Illinois enforcement officers extends only to "offenses" which specifically are defined as "a violation of any penal statute of this state." Illinois Revised Statutes, Chapter 38, Section 102–15.

In short, Illinois police officers, unlike those of many other states, do not have enforcement duties or powers in connection with non-Illinois crimes.

I also find that the federal statute in question, Title 8, United States Code, Section 1324(b), upon which the government relies, does not provide that state and local law authorities have enforcement—authorizes enforcement officers to arrest for exclusively federal crimes in the absence of a state law accepting the authorization.

There is no authority on the part of Illinois police officers or officers of the City of Chicago to stand over the shoulder of a person making out his income tax return and, knowing that he is falsifying the return, and watch him then proceed to a mail box and mail it in to the Internal Revenue Service, and thereupon arrest him for a federal crime.

The statute cannot be intended to impose an authority on state law enforcement officers which the state itself deliberately chooses to withhold from its own officers. Other states have accepted this authority but the state of Illinois has not.

It is intended to confer in Illinois arrest authority on Illinois officers only when Illinois law accepts the federal authorization. Here no such acception has been made.

The design of the United States Immigration and Naturalization law contemplates enforcement of that law by a designated federal agency, expert in that exceptionally difficult field, hence, the only general arrest authority for violation of the law is conferred

upon officers and employees of the Immigration and Naturalization Service. I cite 18 United States Code, Section 1357(a)(2).

Thus, I must reiterate that the statute, 8 U.S. Code, 1324, which prohibits the bringing in of certain aliens, cannot be intended to impose an authority on state or city law enforcement officers in the State of Illinois, which itself has deliberately chosen to withhold that authority from its own officers.

This Court has found that the arrest and search of Mr. Sanchez by the Villa Park police were illegal. The next issue I must decide is whether the information obtained from this illegal arrest should have been excluded from use as evidence—or should be excluded, at the trial of this case.

The purpose of the federal exclusionary rule is to protect the rights guaranteed by the Fourth Amendment, to deter illegal police conduct by denying admission into evidence of the matters obtained at the depravation of the rights of the people to the contrary notwithstanding.

The question of what evidence is to be excluded was discussed by the Supreme Court in *Wong Sun* vs. *the U.S.* at 371 United States Reports 471, 487–488, in 1963.

In effect that case states that the court should exclude all evidence proximately derived from the illegal police conduct not "so attenuated as to dissipate the taint," unless the government can show that the evidence could have been obtained from an independent source sufficiently distinguishable to be purged of the primary taint.

I am speaking of the doctrine of the poison—the fruit of the poison tree. The exclusionary rule applies to verbal evidence equally with physical evidence.

Wong Sun vs. *United States*, 371 U.S. Reports, 471, 487–488, 1963.

Courts exclude the testimony of a witness when the witness has been found as a result of illegal police conduct. *Smith* vs. *United States*, 344 Fed. 2d 545, District of Columbia Court of Appeals, 1965; *U.S.* vs. *Alston*, 311 F. Supp. 296, District of Columbia, 1970; *U.S.* vs. *Tane*, 329 F. 2d 848, a Second Circuit Decision in 1964.

The foregoing federal cases involve the discovery of witnesses at some point on a casual chain leading from illegal police conduct.

In the case at bar there is no attenuating circumstance whatsoever. The witnesses whose testimonys are sought to be suppressed were discovered not merely as a result of illegal police conduct but in the course of that illegal conduct. Those courts which have considered the problem of a witness discovered during an illegal search, seizure, arrest or detention have been uniform throughout in excluding the witnesses' testimony absent a showing of independent source of access to the witness. *People* vs. *Michaelson*, 59 Calif. Reports, 2d, 448; *Abbott* vs. *United States*, 138 Atlantic Reports, 2d. 485; a District of Columbia case, Municipal Court of the District of Columbia, of course, *People* vs. *Albea*, 2 D 11, 2d, 317, 118 N.E. 2d 277; *State* vs. *Rogers*, 27 Ohio Ap 2d, 105, 198 N.E. 2d 796.

The government has not shown that the testimony of the passengers found in Sanchez' automobile could have been obtained independently of the events that transpired in Villa Park on Nov. 17, 1971, when, without probable cause, Mr. Sanchez was taken into custody.

I have found illegal police behavior here; I must also exclude, therefore, the evidence obtained as a

result therefrom or proximately flowing from these events, including the identification of the passengers and any evidence obtained through the use of that information.

I should like to discuss one other matter. Villa Park authorities apparently regard as naturally suspect and detain persons found in that city at night, unless they provide identification that the police find satisfactory.

Villa Park practices, as they exist in many of the other suburban cities around Chicago, are similar to that of the Euclid, Ohio police practice of arresting all persons found abroad at night in Euclid, Ohio, who do not give a satisfactory account of themselves. This constitutes a police state, which the United States Constitution and the Supreme Court have been careful to try to prevent occurring here in the United States. That practice is illegal, even though authorized by ordinance. *Palmer* vs. *City of Euclid*, Ohio, 402 U.S. Reports 544, a recent decision of the United States in 1971.

I cannot help but wonder whether or not the fact that the defendant is of Mexican origin, though a citizen of the United States, was not simply and only instrumental in his arrest. Would the same treatment have been afforded four Caucasians in the same situation, with the same circumstances, particularly where the driver's papers were in order? I believe not.

* * * * *

In this case there was not only less than probable cause to arrest Mr. Sanchez, there was not even that quantum of suspicion which would justify a stop and search under Illinois law.

Accordingly, I grant the defendant's motion to suppress all of the evidence obtained as a result of his arrest and of his being taken into custody. I have

made these statements as my findings of fact and conclusions of law.

* * * * *

Mr. STEVENSON: Very well, Judge. One thing that your Honor did state in your opinion is not clear to me, and that is, does your Honor find that a search occurred of the defendant's car in which the passengers were——

The COURT: Interrogation of the passengers constituted a search of the car.

Mr. STEVENSON: Even though the passengers were in plain view?

The COURT: Yes.

* * * * *

Mr. STEVENSON: Yes, sir. Your decision prohibits any testimony from the passengers of the car, is that correct, Judge?

The COURT: Or any information obtained as a result of their interrogation.

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